IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-349

UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY HELSTOSKI,
Respondent.

No. 78-546

HENRY HELSTOSKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

HONORABLE H. CURTIS MEANOR,
Nominal Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR HENRY HELSTOSKI
Respondent in No. 78-349; Petitioner in No. 78-546

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Preliminary Statement

On June 2, 1976, a grand jury for the United States District Court for the District of New Jersey returned an indictment in which then Congressman Helstoski was a named defendant. The charging language of the indictment in Count I, after reciting Mr. Helstoski's status as a Congressman, says:

> "[Congressman Helstoski with others] did conspire . . . to violate . . . Title 18, U.S.C. § 201(c)(1) by . . . corruptly asking . . . receiving and agreeing to receive money . . . in return for . . . being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives."

The overt acts charged include:

> "2. From in or about August of 1967 to in or about May of 1968, the defendant, Henry Helstoski, introduced private bills in the United States House of Representatives for clients of Vincent J. Agresti.
>
> "11. On or about October 13 1972, the defendant, Henry Helstoski, introduced private bills in the United States House of Representatives for Osvaldo Aguirre, Patrice Bergeoing, Raul Rojas, Hernan Molina and Alejandro Gonzalez and other members of their families.
>
> "13. On or about September 6, 1973, the defendant, Henry Helstoski, introduced a private bill in the United States House of Representatives for Luis and Maria Echavarria.
>
> "16. On or about January 27, 1975, the defendant, Henry Helstoski, introduced a private bill in the United States House of Representatives for Luis and Maria Echavarria."

Count II, after reciting Mr. Helstoski's status as a Congressman, charges that he

> "corruptly asked . . . and agreed to receive cash payments from each of [five named persons] . . . in return for . . . being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on [their behalf] . . . and thereafter on or about October 6, 1972 . . . corruptly accepted and received as a bribe [moneys] in return for [his] being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on [their behalf] . . . which private bills were introduced by the defendant, Henry Helstoski, on October 13, 1972."

Except for differences in dates, persons, and amounts allegedly received, Counts III and IV track Count II precisely. Count III concludes with the charge that a "private bill was introduced [on behalf of two persons] on September 6, 1973." Count IV concludes with a charge that another bill was introduced on behalf of the same individuals on January 27, 1975.[1]

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[1] The full text of Counts I through IV appears in the appendix to the petition for certiorari in No. 78-546, 1a.

Other counts of the indictment included charges of alleged perjury and obstruction of justice unrelated to the issues now before the Court. None of the counts of the indictment has been tried. Some of these other counts of the indictment included charges against members of Mr. Helstoski's staff along with charges against him, but the former Congressman is the only person named as a defendant in the first four counts of the indictment. All counts in which persons other than Mr. Helstoski were included as defendants were severed from those in which he was the sole defendant.

Before trial Mr. Helstoski moved to dismiss Counts I through IV as offensive to the Speech or Debate Clause, claiming that the indictment was beyond the jurisdiction of the district court in that "these counts are founded upon and allege legislative acts, contrary to the provisions of Article 1, Section 6 of the Constitution of the United States." The District Court denied this motion but held that at trial, "the Government may not, during its case-in-chief . . . introduce evidence . . . of the past performance of a legislative act by defendant." Pet., No. 78-349, 62a.

Trial was deferred while the government pursued an interlocutory appeal from this ruling. During the pendency of that appeal, Mr. Helstoski, by petition for a writ of mandamus/prohibition, sought review of the jurisdictional aspects of the District Court's ruling. The Third Circuit affirmed the evidentiary holding of the District Court but denied the petition.

Separate petitions for certiorari were presented. No. 78-349 is the government's petition seeking review of the evidentiary ruling below. No. 78-546 is Mr. Helstoski's petition questioning the jurisdiction of the grand jury to return, and the District Court to try, an indictment which on its face calls into question the conduct and motives of a Member of Congress in introducing a bill. Mr. Helstoski's petition also questions the power of the District Court to constructively amend the indictment by permitting the trial to proceed with the Speech or Debate Clause being enforced by forbidding the government to prove the legislative acts charged by the grand jury.

From the beginning, the jurisdictional and evidentiary aspects of the Speech or Debate Clause issue have been dealt with together. They were decided in one opinion by the District Court. Pet. No. 78-349 at 2a. In the Third

Circuit, the government's interlocutory appeal and the defendant's petition were consolidated and decided in a single opinion. *Id.* at 38a.

By agreement of counsel, Mr. Helstoski is filing the opening brief, which deals first with the jurisdictional issues presented in No. 78-546. This brief will also address the evidentiary issues in No. 78-349, to the extent that they have been presented preliminarily by the government in its petition for certiorari.

Opinions Below

The opinion of the Court of Appeals is reported at 576 F.2d 511. The opinion of the District Court is not reported. These opinions are reprinted in the appendix filed with the government's petition in No. 78-349 at 2a and 38a, respectively.

Jurisdiction

As to No. 78-546

The judgment of the Court of Appeals (Pet. No. 78-546, 7a) was entered on April 13, 1978. The order of the Court of Appeals denying a petition for rehearing was entered on June 30. *Id.* at 8a. On September 29, 1978, Mr. Justice Brennan extended the time within which to file a petition for certiorari to and including October 3. The petition was filed on September 29 and granted on December 11, 1978.

The jurisdiction of this Court rests on 28 U.S.C., §1254 (1).

As to No. 78-349

The judgment of the Court of Appeals (Pet. No. 78-349, 34a-35a) was entered on April 13, 1978. The order of the Court of Appeals denying the government's petition for rehearing was entered on June 30. On July 25, Mr. Justice Brennan extended the time within which to file a petition for certiorari to and including August 29. The petition was filed on that day and granted on December 11, 1978.

The juirsdiction of this Court rests on 28 U.S.C., §1254 (1).

Questions Presented

In No. 78-546

1. Does the United States District Court have jurisdiction to try petitioner on an indictment which on its face charges that as a Member of the Congress of the United States he performed certain specific and identified legislative acts, to wit: the introduction of bills in Congress, with corrupt motivation? Under the Speech or Debate Clause, does not Congress have exclusive jurisdiction to inquire into its Members' performance of legislative acts?

2. May an indictment offensive to the Speech or Debate Clause, both on its face and in the means by which it was procured, nevertheless be prosecuted by forbidding proof at trial of the legislative acts specified in the indictment? Would not such a trial procedure amount to both an impermissible manipulation of the Speech or Debate Clause and a constructive amendment of the indictment, in violation of the Fifth Amendment right to be tried only upon the indictment voted by a grand jury?

3. May the above-described indictment of a Congressman, having been procured by calling into question before a grand jury the legislative acts of that Congressman, nevertheless proceed to trial?

In No. 78-349

(as stated by the government in its petition)

1. Whether the Speech or Debate Clause bars the government from introducing, in the bribery trial of a former Congressman, any evidence that, although not a legislative act, refers to the defendant's past performance of a legislative act.

2. Whether the voluntary giving of testimony and production of documents before a grand jury by a Congressman who is aware of but does not invoke the Speech or Debate Clause privilege constitutes a waiver of that privilege with respect to use of those documents and that testimony at the trial of an indictment returned by the grand jury, when there has been no express authorization by the Congressman of such use.

Constitutional and Statutory Provisions Involved

Article I, Section 6 of the Constitution provides, in pertinent part:

> ". . . for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

Article I, Section 5 of the Constitution provides, in pertinent part:

> "Each House may . . . punish its Members for disorderly Behaviour . . ."

The Fifth Amendment to the Constitution provides, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . ."

Title 18, U.S.C., §201 provides, in pertinent part:

"(a) For the purpose of this section: 'public official' means Member of Congress . . .; 'official act' means any decision or action on any . . . matter . . . which may by law be brought before any public official, in his official capacity, or in his place of trust or profit. . . .

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act . . . [shall be guilty of an offense]. . . .

"(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

Statement

From 1965 through 1976, for six terms, Henry Helstoski was a Member of the House of Representatives, representing the Ninth Congressional District of New Jersey. He was defeated in the general election of 1976.

Mr. Helstoski's district included areas in Bergen and Hudson Counties populated by a range of ethnic groups, including many relatively recent immigrants to the United States. Problems under the immigration laws are commonplace in such districts, and Mr. Helstoski and his staff gave constituents assistance in the resolution of those problems. From time to time Mr. Helstoski, like many other Members of Congress, especially those from multiethnic districts, introduced bills in Congress to suspend the operation of the immigration laws as to particular individuals. Such bills are generally referred to as private immigration bills.[2] Private legislation constituted a small percentage of former Congressman Helstoski's legislative activities.[3] A particularly active legislator, he sponsored

[2] Any such bill, upon being introduced, is referred to the Subcommittee on Immigration of the House Judiciary Committee. The Immigration and Naturalization Service of the Department of Justice, and the Department of State, render reports on each proposed bill for incorporation into the committee's file on the intended beneficiary. In due course the subcommittee and in turn the committee make recommendations to the House. For each session of Congress the committee prepares a House document which includes a schedule of all bills introduced by all Members and its recommendation as to each. A similar procedure is employed in the Senate.

[3] During his 12 years in Congress, Mr. Helstoski introduced 178 private bills, of which 23 were introduced at the request of other Members (*e.g.*, his predecessor in office, Members from other districts who had constituents interested in a person residing in the Ninth District, etc.).

much legislation and held important committee assignments.[4] He had a staff of 18 persons, under budgetary allocations of the House, many of whom were designated "case workers" assigned to constituent services, effectively mediating between private individuals and the federal bureaucracy.

In the Fall of 1973, Mr. Helstoski heard rumors of corruption centering on a former aide[5] who allegedly had participated in the taking of moneys from Chilean aliens to influence Mr. Helstoski's introduction of private immigration bills. Upon hearing the rumors, Mr. Helstoski promptly called the Chileans into his office and, after listening to their accounts, directed them to the F.B.I. See, unpublished opinion of the District Court, February 24, 1977 (Pet. No. 78-546, 20a). The Chileans did in fact go to the FBI, which initiated an investigation of the matter.

The grand jury proceedings herein, so far as Mr. Helstoski knows, commenced in April, 1974. At that time, it appeared that Albert DeFalco, the one-time aide, was the target. In fact, Mr. DeFalco and some others never associated with the Congressman were indicted in May, 1975. Standing trial alone, Mr. DeFalco was convicted in November of that year of falsely claiming, in violation

[4] Mr. Helstoski sponsored or co-sponsored more than 2,500 other pieces of legislation. His committees during his 12-year service included Ways and Means, Interstate and Foreign Commerce, Government Operations, Merchant Marine and Fisheries, Veterans' Affairs, Science and Astronautics. He had been chairman, for three years, of the Subcommittee on Education and Training of the Committee on Veterans' Affairs.

[5] Albert DeFalco had been employed by Congressman Helstoski as a legislative aide some time in 1967 and 1968. Since then he had not been employed by Mr. Helstoski except as a campaign aide during one election campaign.

of 18 U.S.C. § 912, that he was an aide to Mr. Helstoski, and of conspiring to do so.[6] That conviction was bottomed upon testimony that one Ronald Blackwell, a factory manager, had taken money from some of his alien employees and their friends, whom he had introduced to Mr. DeFalco. The latter in turn recommended the aliens to the Congressman as beneficiaries of private legislation. The theory of that prosecution was that the aliens paid Mr. Blackwell in reliance upon Mr. DeFalco's false claim to be a secretary to Mr. Helstoski and that Mr. DeFalco shared in the proceeds.[7] At the time of the *DeFalco* trial the government made no charge that Mr. Helstoski was involved in the conspiracy of which Blackwell pleaded guilty and DeFalco was convicted after trial. In fact, the prosecution insisted at the *DeFalco* trial that the defendant acted without any authority to speak on behalf of Mr. Hel-

[6] The statement in the government's petition in No. 78-546 that "De Falco was convicted of *bribery* charges in connection with private immigration legislation" (n. 2, p. 4; emphasis added) is simply not true. The charges against him were conspiracy to impersonate falsely under 18 U.S.C. § 912, and substantive offenses under the same statute. See indictment in *United States* v. *DeFalco, et al.*, Cr. No. 75-264, United States District Court for the District of New Jersey, reprinted in appendix to petition for certiorari *sub nom. DeFalco* v. *United States*, No. 77-6872, 17a.

[7] Mr. DeFalco was also convicted of false impersonation in order to take money from an Argentinian couple, the Echavarrias. His conviction on that count has since been vacated and the count dismissed upon proof that the government had withheld exculpatory evidence, *United States* v. *DeFalco*, Cr. No. 75-264, United States District Court for the District of New Jersey, unpublished opinion of Judge Lacey, 8/8/77, reprinted in appendix to petition for certiorari, *supra*, note 6.

stoski and that he fraudulently represented himself as the Congressman's administrative secretary or aide.[8]

Reversing course, the government now charges that the Congressman and Mr. DeFalco were in conspiracy with each other with respect to the very same transactions that were at issue in the *DeFalco* case.

Though he appeared before grand juries ten times, Mr. Helstoski never appeared before the grand jury which indicted him. This reflects the peculiar and perhaps unique[9] manner in which the U.S. Attorney for New Jersey structured the grand jury proceedings. Eight grand juries heard testimony and received documents. Portions of that evidence were then selected and read to a ninth grand jury—the indicting grand jury—which also received some additional material. No legislative materials were given by Mr. Helstoski to the indicting grand jury. It never even saw him.

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[8] In its opening at the *DeFalco* trial, the government said:

> "It was Mr. DeFalco who pretended . . . although it was not true . . . that he was at the time he was dealing with these aliens still the administrative aide to Congressman Helstoski. . . . We will prove to you, of course, that he was not at that time the administrative aide or secretary to Congressman Helstoski . . . and that *at no time was he authorized to speak on . . . [Helstoski's] behalf.*"

United States v. *Albert DeFalco, supra,* Tr., 10/6/75, p. 41 (emphasis supplied).

Indeed, in the course of the *DeFalco* trial, overt act allegations as to the introduction of private bills were stricken (Tr., *DeFalco* trial, 10/14/75, pp. 904-906) precisely because the Congressman was not charged with being a participant in that conspiracy.

[9] See opinion of Judge Meanor (Pet. #78-546, 15a).

All of these proceedings before the ninth grand jury took place during five sessions held over the course of two weeks (May 19-June 2, 1976) in which testimony from more than two years of investigation by other grand juries was presented. Mr. Helstoski's responses to inquiries by the earlier grand juries were included in the materials submitted by the prosecutor to the indicting grand jury. Also included was evidence of the Congressman's legislative acts. Moreover, as Judge Meanor specifically found, significant exculpatory material was culled out (Pet. No. 78-546, 19a-22a). The process culminated when the ninth grand jury returned an indictment just one week before the 1976 primary election.[10] Pet. No. 78-546, 13a.

The grand jury proceedings continued for over two years between April, 1974, and May, 1976. During that time Mr. Helstoski appeared ten times before eight different grand juries. At the request of the government and/or pursuant to subpoena, he submitted to the grand juries various materials, including copies of bills and correspondence relating to bills. He testified about the procedure by which he introduced bills in the House and he detailed how his office dealt with private bill requests. He also testified about his own investigation into allegations of payments surrounding the Chileans' bills.

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[10] Mr. Helstoski has not been given an opportunity to inspect all the grand jury proceedings. But on ascertaining that an unusual procedure involving multiple grand juries had been employed by the U.S. Attorney, he made a motion to dismiss the indictment on that account. In the course of passing upon the motion to dismiss on those considerations, the District Court examined the file of all grand jury proceedings. Its opinion (Pet. #78-546, 9a-22a) discloses the facts as to how multiple grand juries were employed in this case. Questions as to the propriety of the use of multiple grand juries in the manner described by the District Court are not currently before this Court in the pending petitions.

M. Helstoski on each appearance before the grand jury was told that he was not required to testify or produce documents that might incriminate him. See opinion of the Court of Appeals (Pet. No. 78-349, 6a). But at no time did the government seek a waiver of any rights or privileges he may have had under the Speech or Debate Clause. *Ibid.*

At no time during all the grand jury proceedings was Mr. Helstoski ever notified that he was a target of the investigation.[11] Indeed, when on May 7, 1976, he inquired whether he was a target, he was informed that the question was "inappropriate." Tr., grand jury proceedings, May 7, 1976, p. 13, C.A. App., 1501.[12]

From and after the government's refusal to state whether he was a target, Mr. Helstoski submitted to the grand jury no material by way of bills or correspondence relating to bills. Neither did he offer any testimony with respect thereto.

Mr. Helstoski has at all times vigorously denied the receipt of moneys for the doing of any legislative act. Indeed, he insists that the government, by reason of its own intensive investigation of virtually all of his constituent-service activities during his six terms in Congress, is fully aware that he assisted thousands of his constituents by numerous acts, without a suggestion or hint of

[11] As explained by Judge Meanor in his unpublished opinion (Pet. #78-546, 20a), there was no question that the government was investigating the "purchase [of] private immigration bills from a 'connection' with the House of Representatives." But the suggestion that it was the Congressman, rather than his former aide, who was the "connection" was never advanced to Mr. Helstoski.

[12] "C. A. App." designates a five-volume appendix filed by the government in the Court of Appeals.

corruption, and that he himself instigated the investigation when he heard rumors of payments by supplicants for private bills. In the face of an impressive and impeccable record, the U.S. Attorney is staking his case on two or three witnesses, each of whom is beholden to the prosecutor because of deep involvement in illegal activities[13] and has contrived testimony which is contradicted both by objective facts and by Mr. Helstoski's unblemished record. The testimony was designed, however, to satisfy the U.S. Attorney's ill-concealed desire to put an end to

[13] Because the government requested the District Court to give advance rulings as to the admissibility of certain proposed testimony (*infra*, p. 17), the defense in this case has been favored with a preview of the government's anticipated trial presentation far more complete than it normally receives in a federal criminal trial with limited discovery.

Without reviewing the case in all of its details, it is plain that the Echavarrias, mentioned in Counts III and IV, are to be among the mainstays of this case. They were on their way to being deported because of the failure of private legislation introduced on their behalf. However, on their agreement to testify against the former Congressman, the then U.S. Attorney arranged that they be permitted to stay in the country, despite the fact that he knew, from evidence before one of the non-indicting grand juries, that the couple had engaged in "criminal conduct" by way of a fraudulent statement of a business investment "in their quest to obtain permanent residence;" opinion of Judge Meanor, Pet. No. 78-546, 22a. Thus, the Echavarrias were "trading up," the process described by the press in the *Garmatz* case, *infra*, n. 15. The two other witnesses mentioned by the government in its proposed testimony made comparable arrangements for either no prosecution at all or light sentences. By contrast, Mr. DeFalco, who not only has asserted his innocence but has insisted that the Congressman knew nothing of moneys being passed for legislation, received a six-year sentence. Indeed, Mr. DeFalco unsuccessfully sought to discharge his assigned trial counsel, a former Assistant U.S. Attorney, complaining that "They want me to perjure myself to get off the hook." Tr., *United States* v. *DeFalco*, October 6, 1975, *supra* note 6 p. 3.

Mr. Helstoski's career in Congress,[14] which is also evidenced by timing this indictment to have maximum political effect. The word of such witnesses was made credible to the grand jury by the deliberate exclusion of significant exculpatory evidence.[15]

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[14] In separate litigation which is still pending, the Third Circuit sustained the right of Mr. Helstoski to sue the former U.S. Attorney on his claim that the prosecutor had engaged in a massive program of leaks to the press during the grand jury investigation for the purpose of discrediting the then Congressman. *Helstoski* v. *Goldstein*, 552 F. 2d 564 (3d Cir., 1977).

Irresponsible smearing of the former Congressman's name is evident even in papers presented to this Court. At page four of the government's petition we read that grand jury investigations "inquiring into corruption in connection with private immigration legislation . . . continued for a number of years and have resulted in several indictments and convictions, including those of respondent's former administrative assistant *and his brother*" (emphasis supplied). While the government accurately cites the opinion of the Third Circuit for this contention, the government is fully aware of the inaccuracy of that statement. The former Congressman's brother was convicted of filing false income tax returns on behalf of a construction company of which he was an officer. In no way was any matter relating to any immigration bills involved in that prosecution, nor was the Congressman in any way involved in the construction company.

[15] The U.S. Attorney's office in Newark has previously demonstrated its penchant for indicting Congressmen on flimsy and unreliable evidence. It reached out to Baltimore and undertook in the federal court of that city the prosecution of then retired Congressman Garmatz. That prosecution was ultimately dismissed at the request of the government when diligent investigative efforts by defense counsel unearthed indisputable evidence that the government's main witness had contrived a story implicating the Congressman in order to cover his own criminality, a technique dubbed "trading up" by prosecutors. *Washington Post*, January 10, 1978, p. 1. While the U.S. Attorney's office in Newark announced it would investigate the government witness (*Newark Star-Ledger*, January 10, 1978), no indictment has to this date been announced.

Proceedings Before the District Court

Before trial, and on or about January 10, 1977, Mr. Helstoski made a motion to dismiss the first four counts of the indictment as being offensive to the Speech or Debate Clause of the Constitution. At a pretrial *in camera* conference on February 1, 1977, the District Court rendered an oral opinion denying the motion to dismiss but holding that the Speech or Debate Clause prohibited the government from proving during its case-in-chief the performance by Mr. Helstoski of any legislative act.

Following the court's *in camera* ruling of February 1, the government moved to postpone the trial, which had been scheduled to commence on February 15, in order to pursue an interlocutory appeal pursuant to 18 U.S.C. § 3731. Accordingly, the District Court, which had hitherto withheld its opinion and order on defendant's motion to dismiss in order to avoid pretrial publicity, filed them on February 22 and February 23, respectively. The opinion, which reiterated what the court had said *in camera*, is set forth in the appendix to the government's petition in No. 78-349, at 38a.

The District Court noted the government's concessions that the private immigration bills constituted legislative acts and that Mr. Helstoski's subsequent defeat in the general election had no effect upon his assertion of the Speech or Debate Clause; Pet. No. 78-349, 47a. The court declined to dismiss the indictment, believing that the allegations of legislative acts in the indictment were "not essential." *Ibid.* It declined to consider the implications of the grand jury's having heard extensive testimony of legislative acts, stating that it would not go behind the face of the indictment. Turning to the government's wish to prove the legislative acts and the motives or intent of Congressman Helstoski, the court concluded that such proof

was barred by *United States* v. *Johnson*, 383 U.S. 169 (1966), and *United States* v. *Brewster*, 408 U.S. 501 (1972).

Without deciding whether the Speech or Debate Clause created a personal privilege waivable by an individual Member of Congress, the court rejected the government's argument that the privilege had been waived by Mr. Helstoski's appearance before the grand juries or by his making statements or writing letters in which he described legislative acts performed by him. The Court ruled that in light of the purpose of the Speech or Debate Clause any waiver would have to be express and that such a waiver clearly did not exist in this case.

Proceedings in the Court of Appeals

The Court of Appeals appears to have decided in favor of the government on questions as to the validity of the indictment, though it is unclear whether its determination was based upon the merits of the issue or because the issue was presented to it via the procedural route of mandamus. In its introductory discussion it emphasized that Mr. Helstoski was required to show that "he had no other adequate means to attain the relief he seeks" and "the issuance of the writ is in large part a matter of discretion." Pet. No. 78-349, 12a. On the aspect of Mr. Helstosk's mandamus petition claiming that the grand jury had "questioned" his acts in violation of the Speech or Debate Clause, the Circuit Court clearly deferred its ruling. It said:

> "Any argument that the important policies underlying the Clause require dismissal of an indictment returned by a grand jury that heard evidence in violation of the Clause's principles does not go to the jurisdiction of the district court, but to the proper means that this Court should use to effectuate the Clause. As such, we believe it is an argument better left for decision on appeal from a final judgment." Pet. No. 78-349, 20a.

On the evidentiary issue the Court of Appeals affirmed the District Court on every point.[16] The court rejected the government's contention that it could prove legislative acts to establish "the purpose of taking a bribe." *Id.* at 26a. The court pointed out that *Brewster* prohibited "any showing" of legislative acts; hence, legislative acts may not be shown in evidence for any purpose in the course of the prosecution. *Id.* at 28a. The court likewise rejected the government's claim that legislative acts were provable by "introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts." The court noted that allowing a showing by such secondary evidence would render *Brewster's* absolute prohibition meaningless. *Ibid.*

Finally, the Circuit Court rejected the government's waiver argument. Like the District Court, it found it unnecessary to determine whether the Speech or Debate Clause was waivable by an individual Member of Congress. In the light of the purposes of the Clause, it concluded that if the privilege were waivable, such waiver "must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member [and] on the facts of this case we find no such waiver." *Id.* at 32a.

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[16] Mr. Helstoski moved unsuccessfully to dismiss the appeal to the Court of Appeals on the contention that 18 U.S.C. § 3731 did not encompass the ruling made by the District Court since that court had not suppressed evidence when it refused to rule on the government's specific proffers of proof. No cross-petition was filed with this Court on that issue.

Summary of the Argument

The constitutional bar against prosecution in the courts for legislative conduct, drawn from the wellspring of English constitutional history, is a fundamental reinforcing mechanism of our tripartite system of government and is a means of assuring the independence of the legislature. The mechanism by which it operates is the barring of jurisdiction of the executive or judiciary over the legislative acts and motives of Members of Congress. The Speech or Debate Clause effects a forum allocation.

In *United States* v. *Johnson, supra,* the Court held that the necessary implication of the Speech or Debate Clause was not only that a legislative act could not be the basis of an accusation against a legislator, but that even if the accusation was of the performance of a non-legislative act, evidence as to the performance of a legislative act would be barred. In *United States* v. *Brewster, supra,* the Court held that bribery to commit a legislative act could be the basis for a prosecution provided (1) no specific legislative act was implicated in the indictment, and (2) no evidence of a legislative act was admitted in evidence at the trial. The principles of *Johnson* and *Brewster* have consistently been applied to criminal and civil litigation, *Gravel* v. *United States,* 408 U.S. 606 (1972); *Doe* v. *McMillan,* 412 U.S. 306 (1973); *Eastland* v. *U.S. Servicemen's Fund,* 421 U.S. 491 (1975).

All of these cases establish the following two-tiered approach:

> a) There is an absolute bar to prosecution and trial in the courts of acts classified as legislative.
>
> b) There is a secondary evidentiary proscription of proof of legislative acts when such acts are not the basis of the charge but are sought to be used as evidence in support of a charge based on the performance of non-legislative acts.

Moreover, this Court has emphasized that a legislator is entitled to be protected not only from the consequences of litigation but also from the burden of defense. Accordingly, a legislator is entitled to expeditious determination of a claim of violation of the Speech or Debate Clause, which may be presented as a motion to dismiss.

I. As to No. 78-546

1. The Speech or Debate Clause, prohibiting "questioning" of legislators outside the halls of Congress with respect to their legislative acts, clearly includes accusing or indicting them in the courts with respect to such acts. The instant indictment should be dismissed because on its face it charges the performance of legislative acts, to wit: the introduction of bills in Congress, specifically identified. Under the Speech or Debate Clause, read together with the Punishment Clause (Art. I, §5, Cl. 2), Congress alone has the power to accuse its Members where the charge is that they have corruptly performed legislative acts.

The indictment in this case is in sharp contrast to the *Brewster* indictment, which at no point specifies or identifies a single legislative act. This fact was emphasized by the government in its brief and noted by the Court in oral argument on *Brewster.* The charge of specific legislative acts in this indictment, by contrast with *Brewster,* puts it squarely in conflict with the Speech or Debate Clause.

This case is to be distinguished from *United States* v. *Johnson.* There an indictment which charged the performance of non-legislative acts made mention of legislative acts by way of proof In such a case it was possible to purge the indictment of the prohibition charge and proceed to trial. Here that cannot be done because the

charge of specific legislative acts is the very essence of the indictment.

This indictment on its face shows that there was a breach of our jurisdictional limitations of the Speech or Debate Clause barring "question[ing]" except in the Congress for the performance of legislative acts. "Question-[ing]" clearly encompasses all aspects of the prosecutorial process, including both the accusation and the adjudication.

2. A) The ruling of the Court of Appeals, that, despite the clear inclusion of legislative acts within its charging part, the indictment may nevertheless go to trial, the Speech or Debate Clause being enforced by an evidentiary proscription at the trial, plainly violates the Speech or Debate Clause. It means that the prosecutorial process is being bifurcated into two separate compartments, the accusatory and the adjudicatory, and that the Speech or Debate Clause is interpreted to protect the legislator only from trial, but not from accusation. Such an interpretation conflicts with the most basic purpose of the Speech or Debate Clause, namely, the protection of the independence of the legislature. The power to accuse and indict a legislator with respect to legislative conduct would give to prosecutors and grand juries a power to hold Members of Congress to account for legislative acts—precisely what the design of the Constitution seeks to prevent.

B) Additionally, the approach of the Court of Appeals violates Mr. Helstoski's right under the Fifth Amendment to be tried only upon an indictment returned by a grand jury. The indictment shows that the grand jury considered it to be a decisive part of its charge that bills had been introduced—clearly legislative acts. To conduct a trial with the very essence of the grand jury's charge being barred from proof effectively means that the indictment will have been amended, in direct contravention of this Court's decisions in *Ex Parte Bain,* 121 U.S. 1 (1887), and *Stirone* v. *United States,* 361 U.S. 212 (1960). The holdings of those cases take on added force in this case because what is involved is a judicial effort to negate the grand jury usurpation of the exclusive jurisdiction of Congress over legislative misconduct.

3. The Speech or Debate Clause was violated not only in the language of the indictment but also in the entire process before the grand jury. The Speech or Debate Clause prohibition of questioning a legislator in any place other than Congress clearly prohibits such questioning before a grand jury, as this Court held in *Gravel* v. *United States, supra.*

An indictment which is the product of violations of the Clause cannot be sustained. This case is wholly different from *United States* v. *Calandra,* 414 U.S. 338 (1974), holding that evidence obtained by police in violation of the Fourth Amendment may be considered, because here it is the grand jury itself which violated the Constitution. Moreover, the absolute prohibition of the Speech or Debate Clause may not be ignored or avoided, whereas the exclusionary principle operative in Fourth Amendment cases, being judge-made law, is subject to such limitations as the Court deems proper.

Similarly, this case is different from *Costello* v. *United States,* 350 U.S. 359 (1956), which upheld an indictment based on hearsay testimony. Again a constitutional proscription functions far differently from a judge-made rule of hearsay evidence. Moreover, unlike *Costello,* this is not a case where, probably because of inadvertence, testimony otherwise probative and proper was presented to the grand jury without adequate testimonial foundation, the substance of which testimony was thereafter presented at trial. The indictment herein was returned by a grand

jury which had not received any testimony or material from Mr. Helstoski respecting legislative acts. All such materials were deliberately chosen by the prosecutor from testimony which had been presented to eight earlier grand juries and then placed before the ninth, and indicting, grand jury.

4. The clear holdings of this Court are that where an issue is raised as to the permissibility of a prosecution under the Speech or Debate Clause, such issue must be determined promptly so that a legislator would be spared the burden of defending against a prosecution inconsistent with the Speech or Debate Clause. Despite the foregoing, the Court of Appeals approached the entire matter of the validity of the indictment and the action of the grand jury in going beyond its jurisdiction from the vantage point of the limited role of mandamus in reviewing lower court pretrial determinations. Such a view is not only inconsistent with the holdings of this Court on the Speech or Debate Clause; it undercuts this Court's holding in *Abney* v. *Clark,* 431 U.S. 51 (1977), to the effect that where the issue is whether a trial may proceed constitutionally, an interlocutory appeal is appropriate.

II. As to No. 78-349

The clear evidentiary rule that emerges from *Johnson* and *Brewster* is that legislative acts may not be proved at trial in any way for any purpose. This rule is not a traditional rule of privilege; it is not intended to promote secrecy. Rather, it secures the separation of powers by reserving receipt of such evidence to the only proper constitutional forum—the Congress. The plain intent of the government's arguments in this case is to overturn the evidentiary proscriptions articulated in *Johnson* and *Brewster.*

1. A) The argument that the government may prove legislative acts provided it does so indirectly, *i.e.,* by letters from a Member of Congress or the Member's oral statements describing legislative acts, finds no support in, and in fact directly contradicts, *Johnson.* Moreover, were such a rule adopted, it would mean that almost all legislative acts would be provable at trial because the legislative process is necessarily public and Members of Congress are constantly communicating their legislative achievements to constituents.

B) The argument that the government may introduce legislative acts in order to prove not the act itself but the legislator's "state of mind" directly conflicts with the long-standing authority that a court may not inquire into the motives of legislators. The contention that the government may prove legislative acts on the theory that its proof is merely incidental to other proofs has similarly been rejected by this Court.

2. The government has argued that, by appearing before the grand jury and giving it legislative materials, Mr. Helstoski waived his Speech or Debate privilege. But the concept of waiver is wholly inapplicable to the Speech or Debate Clause because that Clause establishes institutional rights and allocates jurisdiction. From the days of Jefferson it has been established that the Speech or Debate Clause may not be waived by an individual Member of Congress. And since the Speech or Debate Clause operates as a forum allocation as between Congress and the Article III courts, no Member of Congress acting individually can alter that.

If the concept of waiver were nonetheless considered applicable to the Speech or Debate Clause, it would not be applicable in this case. On the facts here it is a matter of record that at no point was the Congressman told that he was a target. He had every reason to believe that the

investigation was of a third-party crime as to which he was required to testify. Since there was no point at which he was told he was a target of the investigation, there is obviously no point at which he could be said to have waived by voluntary act those rights which a targeted Member of Congress has. The logical import of the government's waiver argument is that any prior statement by a Member of Congress of his legislative activities constitutes a waiver. Since Members of Congress are always publicizing their legislative activities, the effect would be an elimination of the evidentiary proscriptions of the Speech or Debate Clause.

The careful balance struck by the majority of the Court in *Brewster* was made with full recognition of the observations by the minority of this Court as to the difficulty of drawing the line between legitimate and illegitimate receipt of moneys by legislators. By preventing accusations of specific legislative acts and the introduction of proof of legislative acts, the majority believed it would not open the floodgates to criminal prosecution and civil litigation seeking to question legislative acts as being corruptly motivated. The majority's view has thus far been proved correct.

If, however, the government were to prevail in this case, there would be an invitation to criminal prosecution and civil litigation in many cases where it could be contended that legislative acts were motivated by prior or subsequent receipt of funds though such receipt may well have been consistent with the traditional operation of the American political system. Under such circumstances it is not only the legislature that would suffer. The judiciary would become mired in the quicksand of the politicization of its own process.

ARGUMENT AS TO NO. 78-546

Introduction

The constitutional bar against judicial prosecution for legislative conduct is drawn from the wellspring of English constitutional history—the struggle for democracy embodied in the centuries-long confrontation of King and Parliament, of autocratic power and an ever-broadening franchise. For the Framers of our Constitution, the principle of this immunity was so central that it found its way, unanimously and without debate, into the body of the document upon which American government rests.

The Framers recognized in it the embryonic form of the foundation of our governmental structure, the separation of powers. The English experience had taught them that power, even in a democracy, must be dispersed within the government and that the units of power must be kept at arm's length. Thus, immunity from judicial prosecution for legislative acts was the wall the Framers built to protect the body closest to the people's will from both the executive and the judiciary. There can be no mistaking the Framers' purpose: they were not concerned with courtesy, still less with the perquisites and emoluments of office; their purpose in elevating this kind of immunity to a constitutional level was to safeguard, insulate, and protect the independence and diffuse authority of the legislative body from the inevitable and indispensable concentration of power in the executive.

As explained by Mr. Justice Harlan in his opinion for the Court in *United States* v. *Johnson, supra,* 383 U.S. at 177-79, the Speech or Debate Clause in our Constitution is far more than a mere reflection of the struggles for power between King and Parliament in 17th and 18th Century England. It is a fundamental reinforcing mechanism of

the tripartite "governmental structure . . . so deliberately established by the Founders." 383 U.S. at 179.

> "The legislative privilege protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." [*Ibid.*]

The Speech or Debate Clause was adopted "without debate or opposition," *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969); despite a background of abuse of parliamentary privilege in England (Wittke, *The History of English Parlimentary Privilege* 41-43 [1921]); and the Framers' concern about the possibility of legislative tyranny, *Tenney* v. *Brandhove*, 341 U.S. 367, 375 (1951); because the Founders knew that in a democratic society there was no choice but to protect that branch of the tripartite government which was the "representative of the publick" (2 *Works of James Wilson*, 421 [1967]). Indeed, they believed that without the "great and vital privilege" of Speech or Debate, "all other privileges would be comparatively unimportant or ineffectual," *Story on the Constitution*, quoted in *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880).

The very language of the Speech or Debate Clause shows that the Framers established no substantive privilege protecting a legislator from suffering the consequences of his unlawful acts; rather, the Clause specified *who* could try a legislator for those acts. Thus, the Clause does not say that *any* speech or debate is lawful. The Clause does not establish a license to commit crime. It merely allocates jurisdiction. The desire to keep the judiciary, especially, at a safe distance from the legislature was unmistakeably articulated in the formulation of this Clause as it appeared in the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned

in any *court* or place out of Congress." Art. V, underscoring supplied. The present form of the Clause intended no change of meaning.

In both England and the United States, the mechanism for securing legislative independence was the barring of the jurisdiction of other branches over acts of legislators, giving the legislature the *judicial* power of trial and punishment of unlawful conduct of legislators. But the Framers knew that Parliament had broad judicial powers (*Kilbourn, supra*, 103 U.S. at 183-84) which they had not accorded to Congress, since judicial power had been vested in an independent judiciary under Article III. Thus, if they wished Congress to function judicially with respect to unlawful conduct of individual legislators, they were required further to articulate their intentions as to forum allocation. Hence the specific provision of the Punishment Clause, Article I, § 5, Cl. 2, which prescribes that "Each House may . . . punish its Members for disorderly Behaviour."[17] The Speech or Debate Clause and the Punishment Clause, read *in pari materia*, constitute an unequivocal exception to the grant of judicial power under Article III so that each House—and only each House—may punish its Members for their legislative acts.

On that basis, this Court in its very first Speech or Debate decision, nearly one hundred years ago, said:

> "The Constitution expressly empowers each house to punish its own members for disorderly behaviour. We see no reason to doubt that this punishment may in a proper case be imprisonment. . . ." *Kilbourn* v. *Thompson, supra*, 103 U.S. at 189-90.

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[17] The jurisdiction of a branch of Congress under this Clause extends "to all cases where the offense is such as in the judgment of the [House or] Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. 661, 669-70 (1897).

In *In re Chapman*, 166 U.S. 661 (1897), the Court made clear that this power included inquiry into alleged bribes of Members of Congress.

Thus, the Speech or Debate Clause, combined with the Punishment Clause, effects a forum allocation, vesting the power to accuse and judge with respect to legislative misconduct in Congress and withholding that jurisdiction from Article III courts. Legislators are not given free reign as "privileged persons;" they enjoy no title of nobility; they are simply subject to accusation and trial in the forum of their own branch. And it was clear from the outset that the forum allocation of the Speech or Debate Clause did not relate to *everything* a legislator did. It was applicable only to the extent that the Member was performing a legislative function. By the creation of an institutional as opposed to a personal privilege, the Framers guarded against the abuses of privilege which had tarnished the English Parliament. Thus, the Clause promotes the independence of the legislature rather than the aggrandizement of its Members.

". . . The tradition of legislative privilege is . . . well established in our polity," *Johnson, supra,* 383 U.S. at 179, and has received vigorous enforcement in this Court. Where applicable, the impact of the Clause is unqualified. "Once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an *absolute* bar to interference," *Eastland* v. *Servicemen's Fund, supra,* 421 U.S. at 503; emphasis supplied. And in determining the scope of its application, "The court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view," *Gravel* v. *United States, supra,* 408 U.S. at 617. Hence, the Clause includes within its ambit "anything generally done in a

session of the House by one of its members in relation to the business before it," *Kilbourn, supra,* 103 U.S. at 204.

No less than the acts themselves, the motivation for legislative acts is protected from inquiry, *Johnson, supra,* 383 U.S. at 185. "The claim of an unworthy purpose does not destroy the privilege . . . for it is not consonant with our scheme of government for a Court to inquire into the motives of legislators." *Tenney* v. *Brandhove, supra,* 341 U.S. at 377. *Cf., Fletcher* v. *Peck,* 6 Cranch 87 (1808).

Only 13 years ago the Court first dealt with the question of an allegedly bribed legislator whose legislative conduct might be implicated.[18] *Johnson, supra,* involved a charge that a Congressman had taken a bribe to influence *executive* action. Without hesitation the Court ruled that this did not constitute a legislative act. But what was to be done if, in the course of a trial on that charge of bribery, proof was presented of the commission of a legislative act in support of a charge of corrupt non-legislative activity? And what was to be done with the indictment which, though its main thrust was the charge of non-legislative acts, also included some reference to legislative acts? How was this interlocking of a legislative act and non-legislative activity to be unravelled?

A unanimous Court enunciated a forthright resolution of those questions: Proof of the performance of legislative acts was prohibited. The government was free to

[18] There was never any doubt but that a Member of Congress could be charged with bribery in respect to conduct unrelated to his legislative duties. *Cf., Burton* v. *United States,* 202 U.S. 344 (1906). By contrast, in England, Parliament reserves to itself the sole and exclusive right to punish its members for any bribe, whether or not it relates to the business of Parliament. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecution in the Courts,* 2 Suffolk Law Rev. 1, 13 (1968).

prosecute a claim of criminal conduct involving a non-legislative act. It could prove the receipt of money and the non-legislative act. It was barred from proving the legislative act, even though the sole function of that proof would be to support a charge of performance of a non-legislative act. The retrial of the *Johnson* indictment was not barred because it could be purged and could proceed on its main thrust—the charge of the non-legislative act.[19]

In *Johnson,* the Court specifically rejected two arguments of the government: (a) "that the Clause was meant to prevent only prosecutions based upon the 'content' of speech," 383 U.S. at 182; and (b) "that the Speech or Debate Clause was not violated because the gravamen of the Count was the alleged conspiracy, not the speech," *Id.* at 184.

The *Johnson* rule reflects an inescapable application of the Speech or Debate Clause. For, as the Court explained, once a legislative act, such as a speech in Congress on the floor, is introduced, necessarily "controversy center[s] upon questions of who first decided that a speech was desirable, who prepared it, and what [the legislator's] motives were for making it," *Ibid.* These are precisely the kinds of issues relating to the operation of the legislative process which no judge and jury are empowered to consider or determine.

Brewster was quite different from *Johnson.* Now the government was seeking to establish a bribery case where the sole object of the alleged bribe was legislative activity. The Court was sharply divided on the issue of whether the prosecution was maintainable. The majority held that the government could proceed, despite the fact that the charge "related" to legislative activity; but, said

[19]In fact, on retrial, the government abandoned this entire count. *United States* v. *Johnson,* 419 F. 2d 56 (4th Cir., 1969).

the Court, "[O]ur holding in *Johnson* precludes any showing of how he acted, voted, or decided." *Brewster, supra,* 408 U.S. at 527. The indictment was not subject to dismissal, the majority held, since plainly it made no reference to any specific legislative act.

Three members of the Court argued that the evidentiary proscriptions were not enough. They were of the view that the prosecution was not maintainable at all in view of its relationship to legislative activity. But despite its division, the Court was unanimous in sustaining the straightforward proscriptions of the *Johnson* decision: "These [legislative acts] we *all* agree are protected acts that cannot be shown." *Id.* at 527-28 (emphasis supplied).

The Court was not unaware of the difficulties it was placing in the way of prosecution. "Perhaps the government would make a more appealing case if it could [introduce evidence of legislative acts], but here, as in [*Johnson*], evidence of acts protected by the Clause is inadmissible." 408 U.S. at 528.

Since *Brewster,* the Court has applied the same fundamental approach in three other decisions. The judicial branch could function in areas which "related" to legislative activity, whether in civil (*Doe* v. *McMillan, supra*) or criminal proceedings (*Gravel, supra*). Questions relating to the application of the Speech or Debate privilege in any such proceeding rested upon the nature of the specific act sought to be investigated, charged, or proved: Did it or did it not constitute a legislative act? Disagreements within the Court have centered upon the propriety of a particular classification, particularly as applied to acts precedent to or following legislative acts. See *Gravel, McMillan.* But there has been no question that if an act is classified as legislative, the courts lack jurisdiction to deal with it; testimony relating to it may not be introduced at trial (*Johnson* and *Brewster*) or before a grand jury

(*Gravel*); it may not be the subject of a civil damage suit (*McMillan*) or injunctive process (*Servicemen's Fund*). It matters not that the claim of legislative activity appears to be thin (*Gravel*), corruptly motivated (*Johnson* and *Brewster*) or violative of constitutional rights of citizens (*McMillan* and *Servicemen's Fund*). It is for the Congress, not the courts, to oversee the legislative conduct of Members of Congress.

Two other post-*Johnson* decisions, *Powell* v. *McCormack, supra,* and *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), have addressed in particular the proper procedural approach to a case which touches upon the Speech or Debate Clause. Legislators, said the Court, "should be protected not only from the consequences of litigation's results but from the burden of defending themselves," *Dombrowski, supra,* 387 U.S. at 85; *Powell, supra,* 395 U.S. at 505, n.25. Accordingly, any motion to dismiss "shall be given the most expeditious treatment." *Servicemen's Fund, supra,* 421 U.S. at 522, n.7.

Plainly, the Court has developed what amounts to a two-tier test for the application of the Speech or Debate Clause in both civil and criminal proceedings—both tiers drawn by necessary and inevitable implication from all of its decisions beginning with *Kilbourn*:

> (1) There is an absolute jurisdictional bar to prosecution and trial in the courts of acts classified as legislative. *Kilbourn; Servicemen's Fund; Powell.*
>
> (2) There is a secondary evidentiary proscription of proof of legislative acts when such acts are not the basis of the charge but are sought to be used as evidence in support of a charge based on the performance of non-legislative acts. *Johnson; Brewster.*

In this case, despite the foregoing uninterrupted line of authority, the Department of Justice is pressing the Court

to permit grand juries to receive evidence of legislative acts and motives, to return indictments which on their face charge legislative acts and motives, and to permit prosecutors of such indictments to introduce evidence of legislative acts and motives before petit juries. This case amounts to nothing less than an effort by the Department of Justice to have the Court undermine a line of authority which has been absolutely consistent since *Johnson* and which represents the narrowest possible meaning of the Speech or Debate Clause. If, upon the arguments made by the government in this case, legislative acts and, by necessity, the entire legislative process—the who, what and why of legislation—are to become the grist of grand juries and the fare of criminal and civil judges and petit juries, then as Mr. Justice Miller put it in *Kilbourn, supra,* 103 U.S. at 201, "Of what value is the constitutional protection?"

POINT I

The indictment in the instant case should be dismissed because on its face it charges the performance of legislative acts, to wit, the introduction of bills in Congress. Under the Speech or Debate Clause, Congress alone has the power to proceed against its members where the charge against them is that they have corruptly performed legislative acts.

In allocating jurisdiction with respect to prosecution for legislative acts, the Constitution declares that for legislative acts a Member of Congress shall not be "questioned." This is of course a term of much broader meaning than "charged," "accused," or "prosecuted," and indeed it is beyond doubt that in prohibiting the *questioning* of legislative acts outside of the legislative forum, the Framers certainly meant to include the filing of charges with respect to such acts.

This is made unmistakably clear in *Kilbourn, supra.* Referring to legislative immunity in "many of the colonies," the Court quoted the Constitution of the Commonwealth of Massachusetts, which provided that Speech or Debate "cannot be the foundation of any *accusation* or prosecution, action or complaint, in any other Court or place whatsoever" (emphasis supplied). The Court said, "the general idea in all of [the Colonial clauses], however expressed, must have been the same, and must have been in the minds of the members of the Constitutional Convention." 103 U.S. at 202-203.

It is indisputable that the indictment in this case (*supra,* 2, 3) charges legislative acts. Count I, alleging a conspiracy, specifically charges an agreement to ask for and receive moneys in return for being influenced in "the introduction of private bills in the United States House of Representatives"—bills which are specifically identified in overt acts No. 2, 11, 13, and 16. Counts II, III, and IV each charge a substantive offense of the receipt of a bribe in return for "the introduction of private bills in the United States House of Representatives," which bills are clearly identified by name of beneficiary and date of introduction.

Since *Johnson,* no one may seriously contend that an indictment can go to trial charging a legislative act. An additional feature of *Johnson* and *Brewster* is that they applied an evidentary proscription as a necessary corollary of the Speech or Debate Clause. Legislative acts could not be proved in support of a charge of a non-legislative act. For, as Mr. Justice Harlan explained in *Johnson*:

> "Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed, and the language of the Constitution is framed in the broader terms." [383 U.S. at 182.][20]

It would turn *Johnson* and *Brewster* on their heads to say that they mean that the *sole* impact of the Speech or Debate Clause is as an evidentiary rule, that an indictment which specifically charges designated legislative acts and is therefore plainly outside the jurisdiction of the court may nevertheless be brought to trial, and that a Member of Congress may be forced to answer to such an indictment. This is precisely what is prohibited by *Dombrowski, Servicemen's Fund,* and *Powell,* all *supra.* Legislators must be protected from the "burden of *defending* themselves," *Powell, supra,* 395 U.S. at 505 (emphasis supplied), in the courts against a charge that they performed legislative acts.[21]

The Speech or Debate Clause effectively establishes a plea-in-bar to a prosecution outside Congress when it is founded upon a performance of legislative acts. (*Cf.,*

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[20] By referring at this point to *Strode's Case,* where a member of the House of Commons was charged with interfering with tin mining, the interference being the introduction of legislation, Mr. Justice Harlan made the point that the prosecution of legislators for their legislative acts may be undertaken under a wide variety of formats which might on their face appear not to confront the legislative process. Clearly, however, when proof of legislative acts is submitted in support of any such charge, the legislative process is implicated and the Speech or Debate Clause must apply.

[21] In the Court of Appeals opinion in *Powell* v. *McCormack,* 395 F. 2d 577, 602 (1968), reversed in part on other issues, *Powell* v. *McCormack, supra,* Judge (now Mr. Chief Justice) Burger suggested that it was not even necessary for the legislator to "answer" a charge made in court. While this Court has stated that the filing of a motion to dismiss is required, *Powell, supra,* 395 U.S. at 505, n. 25, the force of the Speech or Debate Clause in barring a *charge* can hardly be questioned.

Burger, *J.*, in *Powell* v. *McCormack, supra,* 395 F. 2d at 602). Where an indictment on its face, as in this case, charges legislative acts, it directly confronts the Speech or Debate Clause, for plainly such an accusation means that a charge of the performance of a legislative act would be tried in an Article III court and not the Congress. Dismissal is the only remedy for such a direct violation of the Speech or Debate Clause.

The Court in *Brewster* considered whether the indictment there could proceed and decided that it could. A careful analysis of the indictment in *Brewster,* as well as this Court's decision thereon, will show how different is the instant case—and how the necessary implication of *Brewster* is that the within indictment may not proceed to trial.

In *Brewster,* a Senator was charged, in five counts of a 10-count indictment, with taking money in return for an agreement to perform official acts and taking money for having performed official acts in violation of 18 U.S.C. § 201(c,g).[22] *At no point in the entire Brewster indictment was a single legislative act specified or identified.* The brief submitted by the government in *Brewster* highlighted the fact that "there is no reference in this indictment to any Speech or Debate in the Senate"[23] and, as the following

[22] Counts 1, 3, 5, and 7 charged he took money "in return for being influenced in his performance of official acts in respect to his action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity . . . ," in violation of § 201(c). Count 9 charged that he took money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . ," in violation of § 201(g).

[23] See supplemental memorandum on reargument submitted in *Brewster* No. 70-45.

exchange shows, this point was highlighted during oral argument before this Court:

> "Q. [by Mr. Justice Marshall] Well, is speech or debate mentioned in the indictment?
>
> Mr. Ramsey [counsel to Senator Brewster]: Oh, no, it is not. You are asking, sir, whether it is said in the indictment that a particular speech was made as—
>
> Q. No, the words 'speech or debate' or anything closely resembling it in the indictment, which is the one thing we have before us.
>
> Mr. Ramsey: No. I would have to answer that directly, sir, that is not in the indictment. There is no word—"

Tr., oral argument, March 20, 1972, p. 18.[24]

Examining the specific allegations of the four counts of the *Brewster* indictment, this Court noted that as written it did not require inquiry into "how he debated, how he

[24] A comparable exchange appears later in the transcript:

> "Q. [by Mr. Justice Marshall] On the facts of this case. Is there any allegation in the indictment that he did vote that way?
>
> Mr. Ramsey: Well—
>
> Q. No, there's nothing in there that says it.
>
> Mr. Ramsey: There is nothing in the record of this?
>
> Q. Am I right?
>
> Mr. Ramsey: Not in the indictment, sir. I have never taken that position.
>
> Q. Well, that's what is before us."

Id. at 27-28.

voted, or anything he did in the chamber or the committee," 408 U.S. at 526. The indictment merely referred generally to "legislation which might at any time be pending" before Congress. Even as to the fifth count at issue the Court noted that "inquiry into the legislative performance itself is not necessary," *id.* at 527, because plainly it referred to no specific legislative act.

Of particular interest on this issue is the majority's response to Mr. Justice White's dissenting opinion. Mr. Justice White "would take the Government at its word," 408 U.S. at 554, that it intended at trial to prove a legislative act that it had not specified in the indictment. The majority rejected his view, insisting that *on the indictment there pending* the prosecution was not required, and in any event would not be permitted, to prove any legislative act.

Since the *Brewster* indictment carefully avoided any reference to a specific legislative act, the Court saw that it did not breach the jurisdictional wall set up by the Speech or Debate Clause. The grand jury in the indictment had not crossed the boundaries of its jurisdiction nor had it called for a trial that would do so.

By contrast with *Brewster,* the indictment in the instant case unabashedly charges a former Member of Congress with the performance of certain specific and identified legislative acts. It directly conflicts with the Speech or Debate Clause, which allocates jurisdiction over such charges to the House.

To be sure, the grand jury in the instant case need not have made these charges of legislative acts in order to make out a valid charge under 18 U.S.C. § 201. It could have proceeded as in *Brewster,* and the trial could have gone forward in accordance with the strictures of that decision. But this grand jury chose not to so limit itself

and insisted on making a charge outside of its jurisdiction.

When the grand jury in this case went beyond the format of the indictment in *Brewster* to spell out the introduction of specific legislation, it also defined the charge which it wished to have tried, although that charge was wholly beyond its jurisdiction. There was no difficulty about the Court's saying in *Brewster* that under the statute it is "unnecessary to inquire into the act or its motivation," 408 U.S. at 527, since neither was questioned in the indictment. Thus, the Speech or Debate Clause posed no impediment to the trial of the indictment which the grand jury returned. But once the *Helstoski* grand jury chose to charge specific legislative acts and motivation, it set the contours of the accusation to be tried—and that case cannot be tried before a petit jury any more than it can be charged by a grand jury.

Plainly, the government is prohibited from proving legislative acts. But if it is to try *this* indictment, if it is to try what the grand jury charged to Mr. Helstoski, then it must prove those legislative acts. By choosing to charge specific legislative acts, as in *Helstoski,* the grand jury has made this a wholly different case from *Brewster* and has rendered it impossible to try this indictment.

Neither is this a case, like *Johnson,* where the Court permitted the indictment to be retried "purged" of all references to legislative acts; 383 U.S. at 185. Inspection of the *Johnson* indictment shows how different it is from the instant one, and why the procedure accepted there is wholly inapplicable to the instant situation.

In *Johnson* the charge was conspiracy to take bribes to perform a non-legislative act, *i.e.,* to bring improper influence to bear on the Department of Justice. The charging part of the indictment includes no reference to

any specific legislative act. The only references to a specific legislative act were in the details of the supporting evidence and in one of 40 overt acts. The indictment could be "purged" of evidentiary allegations and the main thrust of the indictment, which was that Johnson corruptly sought to influence the Department of Justice, would be unaffected. As the Court said, "The making of the speech . . . was only a part of the conspiracy charge." *Ibid.*

Not so here. In this case the conspiracy charge relates wholly and entirely to a bribe for the performance of the legislative acts—the introduction of bills in Congress. And the substantive counts of the indictment again relate explicitly to those acts. Take away the allegations of such acts as set forth in the indictment and the very essence of the indictment is removed.

The *Helstoski* indictment lies not at the periphery but at the very center of the protection afforded Members of Congress under the Speech or Debate Clause. The introduction of bills in Congress is at the heart of legislative activity. Their inclusion in this indictment makes it inevitable that if it is tried, the why's and wherefore's of the legislative process and Mr. Helstoski's motives will be for a jury to determine—precisely what the Framers prohibited.

The design of the Speech or Debate Clause is to maintain within the jurisdiction of Congress the policing and, if necessary, punishment of Members of the House of Representatives and Senators who misuse their powers. That grant of exclusive jurisdiction is as much violated by an indictment which charges legislative acts as by a trial which involves proof of them.

In barring the "questioning" of Members of Congress, the Constitution included all aspects of the prosecutorial process—the accusation as well as the adjudication.

The simple point is that the Speech or Debate Clause is a jurisdictional limitation upon the executive as well as the judiciary. That jurisdictional limitation was breached when the U.S. Attorney sought an indictment outside the jurisdiction of the grand jury and when the grand jury responded by returning the indictment in the instant case.

POINT II

The jurisdictional flaws in the indictment are not correctible and the District Court may not gain jurisdiction by a procedure amounting to an amendment which would effectively undercut the prohibition of the Speech or Debate Clause and violate the Fifth Amendment right to indictment by grand jury.

In its opinion the Third Circuit admitted by necessary implication that the indictment specifically charged legislative acts. The court below, however, was content to disregard all references to legislative acts, although plainly the grand jury considered them consequential. The Court of Appeals said:

> "Since the allegations of the indictment charge a crime even without reference to any acts protected from inquiry under the Speech or Debate Clause,"

those allegations may be ignored (Pet. No. 78-349, 15a).

By taking such an approach, the court below has sanctioned violations of both the Speech or Debate Clause and the Fifth Amendment to the Constitution.

A: The Speech or Debate Clause

This Court in *Brewster* engaged in a painstaking analysis of the indictment, showing that it did not include a charge of legislative acts. Plainly, it did so because if the indictment had involved such charges, the Court necessarily would have sustained the decision below dismissing the indictment. Had this Court believed that what the grand jury charged was irrelevant and that the Speech or Debate Clause could be enforced by an evidentiary proscription at trial, it would not have wasted its time discussing the details of the language of the indictment.

Yet in its opinion the Court of Appeals has done exactly what this Court realized could not be done. By ignoring what the grand jury said and relying exclusively upon an evidentiary proscription at trial, the Circuit Court has effectively bifurcated the prosecutorial process into an accusatory and an adjudicative function. By this division it has eliminated from the Speech or Debate Clause its primary function of protecting Members of Congress from being charged by the executive for the very purpose of bringing about a trial before the judiciary of their legislative acts and motives.

The Constitution gives to Congress alone the right both to charge legislative misconduct and to adjudicate whether it has occurred. That is the essence of the combined impact of the Speech or Debate Clause and the Punishment Clause. That is exactly what Mr. Justice Miller was driving at when he emphasized the common meaning of the Speech or Debate Clause in the federal Constitution and in the early state constitutions (*supra*, p. 36).

Fully appreciating the importance of the *charging* process, this Court mandated that a motion to dismiss such a charge must be given "the most expeditious treatment," *Servicemen's Fund, supra*, 421 U.S. at 533. The approach of the Court of Appeals, if permitted by this Court, would substantially undermine the Speech or Debate Clause.

The U.S. Attorney, the grand jury, and Article III courts do not have the power to question, accuse, or adjudicate legislative misconduct. The Framers recognized that the destructive potential of such powers is too powerful a weapon to leave in the hands of any branch of government other than the legislative; it is a threat to the independence of the legislature. Separating the charging and adjudicative functions, which the decision below sanctions, would negate the core protection of the Speech or Debate Clause. The decision below is an unequivocal message to prosecutors that they are free to direct their attention toward politically disfavored legislators, secure in the knowledge that constitutional excesses by them and by grand juries will be ignored by the judiciary but remembered by the electorate.

The power to hand down an *Helstoski*-type indictment is the power to remove disfavored legislators from Congress. The *charge* that a legislator has corrupted the legislative process, including specific references to legislative acts, is the most serious that can be brought against the Member, for it bespeaks a betrayal of the public trust; it is virtually an automatic and disgraceful close to the career of a Member.[25] While *any* indictment of a Member of Congress has serious implications, the impact of the indictment in this case is of course greater precisely because it charges legislatively acts, implying a breach of the public trust in the area of a Congressman's prime responsibility. The ability to effect the removal of a Member from the Congress by *bringing such a charge* was thus left to the Congress alone and was denied to the executive branch by the Framers.

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[25] To be sure, such a charge would be equally devastating if it emerged from the House of Representatives. But the Speech or Debate Clause vested that power exclusively in the House because the Framers wished the Member's *peers* to weigh the facts before prosecuting the Member's legislative acts.

Is it permissible for the executive to use the grand jury unconstitutionally to obtain an indictment which intrudes upon the legislative sphere, and to publicize the offensive indictment and the charges against the defendant Member of Congress and thereby effect his political defeat, and for the judiciary subsequently to rescue the offensive indictment by holding the legislative acts to be surplussage? What does this "hit and run" scenaria leave of a legislator's right to be held accountable for his actions only to his colleagues and his constituents? What is left of Congress's total jurisdiction, including the power to charge and adjudicate with respect to alleged offenses of its Members? What, in short, is left of the "indispensable" mandate embodied in the Speech or Debate Clause that a Member "be protected from the resentment of everyone, however powerful" whom his acts offend? 2 Works of James Wilson, 421.

B: The Fifth Amendment

The procedure employed by the Third Circuit—in effect eliminating the specific references to legislative acts and considering them surplussage—is exactly what was prohibited by this Court in *Ex Parte Bain, supra,* and *Stirone v. United States, supra.*

In *Bain* the trial court struck some specific and relevant allegations which a grand jury had charged—that it was the Comptroller of the Currency who had been deceived, along with an agent—so that the defendant might be tried on proof of defrauding the agent alone. It was clear that the grand jury need not have made the allegation with respect to the Comptroller, but it did. It was also clear that the allegation was not trivial.

In reversing the action of the lower court, this Court said:

> "While it may seem to the court, with its better instructed mind . . . that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive. . . . How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And *how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?*" 121 U.S. at 10; emphasis supplied.

What *Bain* prohibits is exactly what the Court of Appeals held here. In the instant case, the face of the indictment demonstrates that the grand jury, having before it evidence of legislative acts, believed that a corrupt bargain had been struck, that the defendant accepted certain sums of money in return for which, in the language of the indictment, he *"performed official acts, to wit, the introduction of [specific] private bills."* It is possible—even likely—that had the grand jury not been told that the legislative acts were performed, it would have questioned whether the money had been accepted.[26] While the court below held that it need not and may not be proved at trial that the official act was performed in return for the money

[26] In fact, such concerns figured decisively in the government's decision to take an interlocutory appeal from the District Court's evidentiary ruling. The government feared that if it could not prove the performance of legislative acts, a petit jury might very well doubt the government's proof of alleged bribery.

allegedly given, the grand jury showed that it considered both halves of the alleged bargain equally relevant, by including both—in the substantive counts and in the conspiracy counts, in the critical charging portions of the indictment as well as in the list of overt acts. There is thus great doubt whether the grand jury would have found Counts I through IV of the indictment had it not been deliberately apprised of the introduction of private bills.

Although the *Court* knows the grand jurors need not have included those paragraphs and phrases in order to charge an offense, the very fact that the grand jurors did so illustrates that proof of the performance of official acts weighed heavily with *them*. *Cf., Bain,* 121 U.S. at 9.

That *Bain* has continued vitality is demonstrated by *Stirone* v. *United States, supra.* There an indictment under the Hobbs Act charged extortion in respect to interstate shipments of sand into Pennsylvania to build a steel factory. Instructions to the jury authorized it to rest a finding of guilt either upon a finding of the foregoing or upon a finding that the sand was used to construct a steel mill which manufactured steel to be shipped out of Pennsylvania. Citing *Bain,* the Court reversed on the grounds that the grand jury had made no charge with respect to shipment of steel out of Pennsylvania.

Plainly, the grand jury in *Stirone,* as in *Bain,* need not have charged with the specificity set forth in the indictment. The indictment could have charged extortion with respect to the interstate shipment of materials into and out of the Commonwealth of Pennsylvania, leaving it to the defendant to obtain more details by a bill of particulars. But the grand jury did not choose that course. It shaped the nature of the case to be tried and defined it. When the prosecutor proved a different case and the court permitted the jury to convict thereon, the defendant's Fifth Amendment rights were violated.

Bain and *Stirone* are not decisions imposing technical rules of pleading; they apply fundamental constitutional principles to circumstances where it is plain—as it is here—that the trial court wishes to try a charge different, in a substantial respect, from that charged by the grand jury. Here, as in *Stirone,* the difference between the indictment and the proposed trial "is neither trivial, useless, nor innocuous," 360 U.S. at 217. And, again as in *Stirone,* "although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same." *Ibid.*

Because of the Speech or Debate implication of the modification allowed by the Court of Appeals, this case goes far beyond either *Bain* or *Stirone.* Neither of those cases involved a change which affected the jurisdiction of the grand jury. If *Bain* and *Stirone* mean that it is not for the judiciary to draft criminal charges, then clearly the court below erred when, by in effect redrafting the indictment, it sought to invoke its Article III jurisdiction over a charge which the grand jury had no power to make and the court no jurisdiction to try.

POINT III

The prosecutorial process was employed in violation of the Speech or Debate Clause in that Mr. Helstoski's legislative acts were called into question before the grand jury, and the grand jury relied thereon as a significant aspect of its indictment.

The Framers were aware of and indeed mandated the grand jury system; however, they did not say, Members of Congress shall not be questioned in any other place except before the Congress or the grand jury. Rather, they made the prohibition absolute; there was to be no point in

the prosecutorial process at which legislative acts could be used to accuse their maker. Congress alone was given that power. The grand jury, whatever it may be—judicial instrument or tool of the prosecutor—is not legislative; it is no creature of Congress. Thus, for the prosecutor to call before the grand jury a Member of Congress as a target and to question him about his legislative acts is to violate the Speech or Debate Clause, as this Court specifically held in *Gravel, supra.* And for the grand jury to call a Congressman when he is not told that he is a target and extract testimony from him which he was required to give in an investigation of third-party crime,[27] and for the U.S. Attorney then to use that testimony before another grand jury, reflects a blatant effort to override the jurisdictional barrier created by the Constitution.

Despite the centrality of the Speech or Debate Clause in our scheme of government, the Circuit Court in its opinion perceived this issue as being governed by (1) the limited scope of mandamus as a device to set aside an indictment, citing *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21 (1943), see Pet. No. 78-349, 19a; and (2) the ability of a grand jury to receive tainted evidence, citing *Costello* v. *United States, supra,* and *United States* v. *Calandra, supra;* see Pet. No. 78-349, 20a-21a. By coupling these limitations on the exercise of appellate and judicial power the Circuit

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[27] See *Gravel* v. *United States, supra,* 408 U.S. at 628-29; and see opinion of Mr. Justice Stewart, dissenting in part, *id.* at 630. This view of the operation of the Speech or Debate Clause in circumstances where a third party crime is being investigated was pressed on this Court by the government. See Brief for the United States, 13 *Gravel, supra.*

The district judge who supervised the grand jury proceedings in this case indicated that he, too, understood *Gravel* to mean that the Speech or Debate Clause is inapplicable when a Member of Congress "is called to testify concerning third party crime." Pet. No. 78-349, 37a.

Court held that the *Helstoski* indictment could be tried regardless of what evidence was heard by the grand jury.

We shall discuss the mandamus issue separately in Point IV, below. At this point we will focus on the *Calandra-Costello* issue.

Plainly, *Calandra* does not uphold a grand jury's jurisdiction to question the legislative acts of a Member of Congress. Indeed, in *Calandra* the Court noted that while the grand jury

> "may consider incompetent evidence . . . it may not itself violate a valid privilege, whether established by the Constitution, statutes or the common-law." [414 U.S. at 346].

The grand jury could not itself compel self-incriminating evidence or order the illegal seizure of evidence. No more can the grand jury question the legislative acts of a Member of Congress. Indeed, in *Gravel, supra,* this Court made absolutely clear that the strictures of the Speech or Debate Clause against questioning "in any other Place" than Congress must be applied to the grand jury room. A grand jury may not compel production by any witness of evidence of legislative acts to be used against a targeted Member nor, having obtained such evidence voluntarily for use against a third party, may it later use that evidence against a legislator as a basis for an indictment.

A Member of the House may be asked to testify about possible crimes of third parties, even of his own aides when they are not covered by the Clause, and legislative acts may be evidence as against those third parties, *Gravel, supra,* note 27. But the giving of testimony against third parties is very different from the grand jury's using legislative acts or a Member's testimony about

them as evidence on which to base an indictment of the Member—which is exactly what happened in this case.

Beyond that, *Calandra,* turning as it does upon the Fourth Amendent and the prophylactic function of the exclusionary rule, is very different from the instant case involving legislative immunity. The Court, having itself fashioned the exclusionary rule as a remedy for Fourth Amendment violations (*Weeks* v. *United States,* 232 U.S. 387, 392 [1913]), was free to limit it and suggest that other remedies might be more apprordiate to safeguard rights under that Amendment. *Cf., Calandra, supra,* 414 U.S. at 354, n. 10.

But the Speech or Debate Clause is wholly different. That Clause *itself* gives effect to the separation of powers as it relates to the protection of the legislature from other branches. It is not left to the judiciary to decide how best to insulate Congress from the executive and from itself; rather, the Framers fashioned, embodied, and inserted into the Constitution their own rule of jurisdiction, an absolute and explicit principle, that "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place."

In a decision rendered by the Court of Appeals a short time after its decision in the instant case there is an indication that the court might have some second thoughts about the relevance of *Calandra* to the issue here involved. In *In re Grand Jury Investigation,* 587 F. 2d 589 (1978), the Third Circuit dealt with a grand jury investigation of Congressman Eilberg. Its comments with respect to *Calandra* seem to be in entire accord with those which we have argued. The court said:

> "One other contention of the United States Attorney bears mentioning. He urges that because a witness may not refuse to answer grand jury questions on the ground that the questions were based upon evidence obtained in violation of the fourth amendment, *United States* v. *Calandra,* 414 U.S. 338 (1974), a congressman who is a target of a grand jury investigation should not be heard in opposition to the use of evidence of his constitutionally protected legislative acts. We see no parallel between the two situations. In *Calandra* the constitutional violation was, at least according to the Court's current majority, an unlawful search and not the subsequent use of the evidence so procured. The exclusionary rule, Justice Powell reasoned, is merely a nonconstitutional prophylactic rule aimed at future violations. 414 U.S. at 354. Under the Speech or Debate Clause, however, the constitutional violation is the use of legislative acts against a legislator. Unlike a violation of the Fourth Amendment, which the *Calandra* Court held to be a *past* abuse and thus the lawful basis for subsequent grand jury questioning, it is the very act of questioning that triggers the protections of the Speech or Debate Clause." 587 F. 2d at 598.

This is clearly not a case where a mere court-made rule of hearsay evidence was ignored by a grand jury, *Costello* v. *United States, supra;* we are dealing here with an explicit constitutional prohibition of the questioning process. Neither is this a case where incompetent evidence was introduced inadvertently or amongst a great mass of other evidence accumulated during the investigative period. *Ibid.*

The findings of the District Court as to the structuring of the grand jury process make clear that the grand jury which handed down the indictment—the ninth grand jury to hear evidence in the case—was in fact presented only that material culled from testimony before eight previous

grand juries which was most inculpatory of the Congressman. Material which tended to exculpate him or impeach the witnesses against him was withheld from the indicting grand jury; Pet. No. 78-546, 19a-22a. Thus, when material offensive to the Speech or Debate Clause came before the indicting grand jury, it did so by virtue of a calculated maneuver by the government, not through inadvertence. Material presented to other grand juries by the defendant himself at a time when the government had not informed him he was targeted—material which, because of the multiple grand juries employed by the government could, and should, have been kept from the indicting grand jury—was instead deliberately laid before it as inculpatory of the defendant. As a direct consequence, the grand jury handed down an unconstitutional indictment.

The only possible justification, however remote, for the use of multiple grand juries in this case would have been to insulate the final grand jury—the indicting grand jury—from hearing tainted or impermissible evidence. Instead, the government, having sought out such evidence in the first place, compounded its disregard of constitutional principles by deliberately giving to the indicting grand jury precisely that material it ought never to have received, namely, the evidence of defendant's performance of legislative acts.

In *Gravel* this Court held that the Speech or Debate Clause applied to grand jury proceedings. In that case the Senator knew that he was being targeted and took affirmative action against the grand jury. Here the Congressman was denied that knowledge and produced legislative materials in the belief that, because third-party crime was being investigated, he was legally required to furnish evidence. When a ninth grand jury was proceeding against *him*, he had no knowledge of that fact. There was no way he could have timely acted to protect his

Speech or Debate privilege before that grand jury. But the lower courts could have—and should have—set aside the handiwork of that grand jury because the indictment and the indicting process which produced it were in excess of the grand jury's jurisdiction.

POINT IV

The Third Circuit mistakenly viewed this case as subject to decision on grounds of the limited role of mandamus.

As noted above (*supra*, pp. 18-19), the decision of the Court of Appeals turned in part on that court's perceptions of the limited role of mandamus to achieve pretrial correction of errors of the district court. Certainly, upon the issue of the grand jury's having violated the Speech or Debate Clause, the Circuit Court specifically said that it was deferring decision until a post-trial appeal if that it eventuated. Pet. No. 78-349, 20a.[28]

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[28] The opinion of the Third Circuit in the *Eilberg* case (*supra*, p. 52) suggests that that court in this case did not consider that it was adjudicating the substantive merits of *any* of the issues raised before it in respect to the validity of the indictment, but was merely deciding that mandamus was not an appropriate device upon which to raise those issues.

In *In re Grand Jury Investigation*, *supra*, 587 F. 2d at 589 the court of appeals characterized its decision in the instant case as follows:

> "In *United States* v. *Helstoski*, *supra*, we refused to issue a writ of mandamus to order a district court to dismiss an indictment said to be the product of Speech or Debate Clause violations. In *Helstoski*, however, we deferred consideration of the question whether such a dismissal is required until an appeal from a conviction. 576 F. 2d at 519."

Deferring resolution of the crucial jurisdictional issues in this case until after possible conviction is contrary to previous decisions of this Court. As pointed out above (p. 34), immediate appellate review of a trial court ruling that the Speech or Debate Clause has not been transgressed is precisely what this Court mandated in *Dombrowski, Powell,* and *Servicemen's Fund.*

Additionally, it is now clear that, under *Abney* v. *Clark,* 431 U.S. 51 (1977), the refusal of the District Court to dismiss the indictment could have been appealed as of right pursuant to 28 U.S.C. § 1291. The District Court's denial of a motion to dismiss the indictment was as final a judgment on the Speech or Debate issue as was the determination of the District Court in *Abney* that double jeopardy principles did not bar a trial. But *Abney* was not decided until after the time for appeal had expired. Mr. Helstoski filed his petition for mandamus with the Third Circuit one week after *Abney.* Effectively he sought by mandamus precisely the same relief to which he would have been entitled on an appeal as permitted by *Abney.*

Even more than the double jeopardy clause, the Speech or Debate Clause, involving as it does intra-governmental relations, is not served by deferring a definitive ruling until after the challenged trial. If the claimed bar to trial is valid, there must be no trial, for post-conviction review is too little and too late. If Members of Congress are to be protected from the obligation of defending themselves in respect to a prosecution that on its face violates the Speech or Debate Clause, then it is clear that relief must be obtainable before trial. Post-conviction relief to achieve the rights protected by the Speech or Debate Clause embodies the admission that a legislator has indeed been questioned beyond the halls of Congress concerning his legislative acts.

Especially is this so once it is recognized that the essence of the Speech or Debate Clause is an allocation of jurisdiction. If, as the Clause prescribes, the judiciary has no jurisdiction to try a case in which legislative acts are questioned, then it must, upon being apprised thereof, dismiss the action. Mandamus is of course the classic vehicle for preventing a usurpation of jurisdiction. *DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212, 217 (1945).

For the foregoing reasons, this Court should determine here and now that the indictment in this case may not proceed to trial.

ARGUMENT AS TO NO. 78-349

Introduction[29]

The clear evidentiary rule that emerges from *Johnson* and *Brewster* is that legislative acts may not be proved at trial in any way and for any purpose. There can be no confusion about what this Court said in both these cases. When the Third Circuit decided this case, affirming the District Court's evidentiary ruling, it relied on the holdings of this Court in both cases. Even the government in its petition for certiorari admits that statements in the *Johnson* and *Brewster* opinions "look in the direction of the result reached by the Court of Appeals." Pet. No. 78-349, 14.

There can be no doubt but that the purpose of the government's argument is to overturn the evidentiary pro-

[29] In view of the Court's having consolidated No. 78-349 and No. 78-546 and the agreement of counsel that Mr. Helstoski file the opening brief, we shall at this point briefly address the issues in No. 78-349 although, without consolidation, the government would obviously have opened on that case. Necessarily we intend further to develop our arguments after the government has presented its brief.

scription of *Johnson* and *Brewster*. It resisted the idea of such proscription in *Johnson* and presented a series of arguments to permit it to prove legislative acts, each of which had been rejected by this Court (*supra*, p. 32). In *Brewster* it had pressed the argument that the Congress delegated to the court its disciplinary functions in respect to its Members, an argument which this Court did not accept. Now the government returns to its old theme and puts forward arguments, many of which were presented and rejected before, but all of which are made in the hope that legislative acts, and thus necessarily the motives and intention of legislators when they perform such acts, shall be subject to indictment and proof in the federal courts notwithstanding the Speech or Debate Clause.

The governments' argument, at least as stated in its petition (No. 78-349, at 15) is as follows:

> "Our argument in support of admissibility focuses on the following factors: (1) the acts and conversations in question occurred outside of the congressional sphere and were not part of the due functioning of the legislative process; thus there is no question here, as there was in *Johnson*, of direct proof of a legislative act privileged under the Clause; (2) the evidence is sought to be introduced for the legitimate purpose of proving respondent's state of mind and guilty knowledge in accepting money, and any references to the occurrence of past legislative acts are incidental; (3) proof of the conversations and other occurrences would not 'draw into question' or 'impugn' any legislative act or 'inquire into' respondent's motives therefore."

An additional contention asserted by the government is that defendant "waived" his privilege by appearances that he made before the grand jury. *Id.* at 21.

While these arguments are made to appear as if they are applicable because of the specific facts of this particular case, it becomes quite evident that were they to be adopted by the Court they would be universally applicable and *Johnson* and *Brewster* would effectively be overruled.

POINT I

The Speech or Debate Clause effects an "absolute" prohibition to the introduction of legislative acts on the trial of a member, regardless of the form of the proof or the claimed purpose of the prosecution.

A. The government's argument is that it wishes to introduce evidence of acts and conversations which occurred outside the Congress and that it may do so even though—indeed for the reason that—such acts and conversations establish the performance of legislative acts. In support of the argument it claims that *Johnson* only prohibited *direct* proof of legislative acts and did not prohibit *indirect* proofs. It should be noted that this distinction is nowhere made in *Johnson*, either explicitly or implicitly. In fact, as hereinafter will appear, one reference in the Court's opinion makes clear that the Court did not consider such a distinction of any significance.

It appears that the government means that though it may not be permitted to introduce a copy of a bill with the former Congressman's name on it, it should be permitted to establish that he introduced the bill by presenting a letter of his in which he advised of that fact, or by having a witness repeat an oral statement in which Mr. Helstoski said he had introduced a bill. The government thus misstates the very nature of the Speech or Debate Clause.

The mere fact that others know of the legislative acts of a Member of Congress hardly serves to make those

acts, published outside the halls of Congress, fair game for prosecutors. The Speech or Debate Clause does not establish a privilege of confidentiality or of non-disclosure which may be defeated by publication. Indeed, the acts of a Member of Congress are *supposed* to be published far beyond the legislature, they *should* be well known to others; the dissemination of information about legislative proceedings is in fact a *sine qua non* of our electoral democracy. Thus, what the government calls "indirect proofs" of legislative acts abound. What conscientious legislator has not distributed a newsletter to his constituents, or made a speech to the voters telling of his legislative activity? Is it at all possible to suppose that, by so doing, a Member of Congress makes it possible for the government, or a private litigator, to "question" him about those legislative acts?

Mr. Justice Harlan did in fact make reference to this point in his opinion for the Court in *Johnson,* 383 U.S. at 184, n. 14. Apparently at trial the government had introduced a reprint of a speech made on the floor of Congress. The Court made clear that it was an unofficial reprint rather than the *Congressional Record.* But, this made no difference. For, as the Court noted, "the use of a copy of the speech in this context necessarily required the jury to read that portion and to reflect upon its substance," *ibid.* Clearly, a reprint of a speech is not a legislative act. Yet Mr. Justice Harlan found that the Speech or Debate Clause was nonetheless operative to bar its use as evidence.

If *Johnson* and *Brewster* could be so easily avoided, there would be no obstacle to the government's proving any legislative act in a judicial forum, merely by making use of a Member's own words to constituents. But the Speech or Debate Clause has to do with the jurisdiction of the courts to consider events which occurred in the legislature, regardless of how they are proved. The

Speech or Debate Clause prohibits proof of legislative acts; it does not distinguish among methods of proof. Since the design and purpose of the Clause are to avoid executive and judicial threats to the independence of the legislature—by permitting the legislature to do its own policing of allegations of improper conduct of legislators—plainly it could hardly matter how a legislative act is sought to be proved.

B. The government also contends it ought to be able to introduce legislative acts to show their maker's "state of mind" when he allegedly took a bribe, with any reference to the actual performance of the legislative act being merely "incidental." The disingenuousness of this argument is matched only by the means the government finds to support it. Thus, the government cites to a reference in *Brewster,* 408 U.S. at 527, that

> "evidence of the member's knowledge of the alleged briber's illicit reason for paying the money is sufficient to carry the case to the jury."

Pet. No. 76-438, 16. Omitted is the immediately preceding sentence: "Inquiring into the legislative performance itself is not necessary." *Ibid.*

Clearly, the Court meant that if evidence of a Member's knowledge of the alleged briber's illicit purpose could be shown, *without proof of legislative acts,* the government could still prosecute a legislator for a bribe related to a legislative act. "Perhaps," said the Court, "the Government could make a more appealing case" if it could prove legislative acts, but the Constitution forbids it. 408 U.S. at 528.

There are, of course, other problems with the government's position. The "state of mind" argument is really no different from the claim that if the allegedly corrupt

motivation for a legislative act can be shown, a legislator can be prosecuted. But Mr. Justice Frankfurter's statement in *Tenney* v. *Brandhove, supra,* reminding us of Chief Justice Marshall's opinion in *Fletcher* v. *Peck,* completely answers this suggestion of the government:

> "The claim of an unworthy purpose does not destroy the privilege. . . . The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. at 377.

Furthermore, the idea that proof of legislative acts is merely "incidental" and does not go to the "gravamen" of the offense was raised previously in *Johnson, supra,* and specifically rejected by the Court. 383 U.S. at 184. And, of course, were proof of legislative acts only "incidental," the government would not have halted all proceedings in this case one week before trial in order to pursue its appeal from a decision forbidding such proofs.

C. We find it difficult to respond to the last of the government's contentions because it remains opaque to counsel and is elucidated nowhere in the petition. Obviously, if a legislative act is proved in a trial which charges bribery to commit that act, then necessarily the legislative act is "drawn into question" and "impugned" and the legislator's motive for performing the act is of necessity being "inquired into." The government in its petition simply asserts that this is not so, though by logic and every human experience it is so.

POINT II

The concept of waiver is wholly inapplicable to the Speech or Debate Clause, and if it were applicable, the rulings by both the District Court and the Circuit Court that there had been no waiver are plainly correct.

In its petition the government argued that former Congressman Helstoski waived the application of the Speech or Debate Clause by appearing before the grand jury and testifying as to his legislative acts and presenting documents establishing them. As authority for this position the government relied exclusively on a Seventh Circuit panel holding in *United States* v. *Craig,* 528 F. 2d 723 (1976), which was thereafter vacated *en banc,* 537 F. 2d 957 (1976), and which related to a claim of a state or common law Speech or Debate privilege, not the federal constitutional privilege here at issue.

Additionally, in support of its argument that the Speech or Debate privilege is "a personal privilege available to individual Congressmen" and therefore waivable, the government cites a wholly inapplicable footnote in *Gravel* (Pet. No. 78-349, 23a) which pertains to a Member's control over his *aide's* claim of legislative privilege.

Neither the District Court (Pet. No. 78-349, 59a) nor the Circuit Court (*id.* at 30a) found it necessary to decide whether the Speech or Debate Clause was waivable by a Member of Congress since both courts were satisfied that on the facts of this case there could have been no waiver. Both courts, however, emphasized that the Speech or Debate Clause could not be analyzed as a purely personal privilege because of the institutional function of the Clause.

Our position is presented alternatively:

We do not believe that the concept of waiver can be applied to the Speech or Debate Clause. Both its institutional nature and its jurisdictional function bar any such concept; but if the Court should be of the view that under some circumstances the Speech or Debate Clause can be waived, then certainly the decision of both the District and Circuit Courts that there was no waiver in this case should be sustained.

A. Plainly, the function of the Speech or Debate Clause is not the protection of the confidentiality of communications; legislative acts are normally public, as we explained above. As we have argued, the Speech or Debate Clause does not create a privilege or immunity from prosecution; it simply creates a jurisdictional barrier to examination of the legislative acts in a prohibited forum. It was not the goal of the Framers to privilege legislators or immunize them from the consequences of wrongdoing; it was rather their design to assure that the examination of the acts of a legislator could take place only within the House to which the legislator was elected, thus protecting that entire branch of government from the intrusion of other branches. It is this jurdisdictional perspective which clarifies the nature of the Speech or Debate Clause and determines the issue of waivability. Once it understood that *only* Congress has jurisdiction over the legislative misdeeds of its Members, it is clear that such jurisdiction may no more be yielded by an individual Member than can the jurisdiction of this Court be given up by the will of one Justice.

Neither can the court acquire jurisdiction where the Constitution has withheld it. No one would seriously contend that if a citizen were to testify voluntarily before a federal grand jury inquiring into violations of a state's

Tenement Safety Act, that the grand jury could thereafter indict and a U.S. District Court could try violations of that state statute. And let us suppose the federal grand jury entered the scene by an investigation that might have been within its ambit—*e.g.*, a failure to report rental income derived from the tenement—and then expanded its inquiry into matters such as overcrowding of the tenement or lack of adequate fire escapes, and the witness-target testified about those matters. Certainly the jurisdiction of the federal court could not be thus expanded.

We suggest that the separation of powers which flows in part from the Speech or Debate Clause is, in the present context, on a constitutional par with the sensitive balance embodied in our federalism. The federal judiciary is not authorized to cure all perceived wrongs. Just as some alleged wrongs must be resolved by the individual states, so others must be resolved by the Congress.

The government's citation of note 13 in *Gravel*, 408 U.S. at 622, as authority for alleged waivability, is plainly misplaced. It is clear that the cited footnote merely connotes that it is the Member, and not the aide, who determines whether the aide's services are such that immunity may be claimed. For example, a Member obviously would have the power to repudiate a claim of privilege by his or her cook.

The only truly authoritative exposition of the issue of waiver is that enunciated by Thomas Jefferson in his *Manual of Parliamentary Practice*, written only a few years after the adoption of the Constitution:

> "The privilege of a member is the privilege of the House. If the member waive it without leave, it is

ground for punishing him but cannot in effect waive the privilege of the House." *Id.*, § 30, p. 130.[30]

The House itself acted in accord with Jefferson's statement and, as early as 1846, declined to make a general rule allowing waiver, choosing instead to consider such matters individually, III Hind's *Precedents of the House of Representatives,* 2660; in 1876, Members seeking leave to appear before a District of Columbia grand jury which had summoned them said:

> "Inasmuch as it seemed to be well settled that the privilege of the Member was the privilege of the House and that privilege could not be waived except with the consent of the House, they had thought it their duty to submit the matter to the House." III Hind's Precedents, 2662

[30] Jefferson in the *Manual* cites to debates in Parliament in 1675, in particular a conflict between Sir John Fagg, a member of the House of Commons, and one Thomas Shirley. After litigation in the Court of Chancery regarding the sale of property, Shirley brought his case to the House of Lords on appeal. The Lords ordered M.P. Fagg to answer Shirley's petition as he had answered other of Shirley's pleadings in the courts below. Commons heard of the Lords' order and required Fagg to ignore it, meanwhile ordering Shirley arrested for breaching the privilege of the House. Apparently it was raised as an argument against the actions of the Commons that Fagg, in responding to Shirley's suit in the lower court, had waived whatever privilege he might have had against appearing before the House of Lords. In answer, it was stated by the Speaker (and was thus apparently a rule of Parliament) that:

> "If a Member wave [*sic*] his privilege, he does what he ought not to do; it is the privilege of the House—it may be an argument to punish the Member but not to wave the privilege of the House."

III Grey, *Debates in Parliament in 1675,* 140.

In its petition the government refers to *Coffin* v. *Coffin, supra,* 4 Mass. at 27, for a suggestion that the privilege is personal and therefore, so it argues, waivable (Pet. No. 78-349, 23a); however, the court in *Coffin* was dealing with the obverse of the situation here presented. In *Coffin,* the court indicated that the legislature could not waive the privilege against the wishes of a Member, an authority that would doubtless be relevant against a government claim that Congress had the power to delegate Speech or Debate prosecution to the courts.[31] Clearly, however, whether or not the institution has the power to waive an individual Member's right is wholly irrelevant to the question whether an individual Member may waive the right of the institution and thereby expand the jurisdiction of the courts.

Thus, the history of legislative immunity both here and in England reveals no support for the startling proposition that individual Members of the legislature may waive the jurisdictional immunity granted that branch as a whole, nor can the government find any solid or substantial support for that argument. Indeed, precedent, logic, and the views of the Framers all compel the opposite conclusion. The Speech or Debate Clause is designed to safeguard an institution. It does so by an allocation of jurisdiction which no individual Member may undermine.

[31] This issue was expressly left open in *Johnson* and *Brewster.*

We do not know whether the government intends in this case to assert again that Congress has delegated its powers in respect to bribery cases to the courts. We will not at this time address that issue. It is not mentioned in the Questions Presented in the government's petition although there is a reference to this matter in a footnote; Pet. No. 78-349, 23, n.15. If the government should press this point, we will deal with it in our reply brief.

B. But even if in some situations a Member of Congress could waive Congress' Speech or Debate privilege, plainly such a waiver could not be found on the facts of this case.

As we pointed out above, when the Congressman initially appeared to testify—as he was required to do as a witness in a grand jury investigation (*Cf. United States* v. *Nixon,* 418 U.S. 683, 709 [1974])—he had every right to believe that the investigation concerned third-party crimes as to which the Speech or Debate Clause would be inapplicable. The question of the waiver of his immunity against prosecution in the courts would not even be at issue until such time as he was told that he, and not a third party, was the target of the grand jury investigation. While we recognize that in other circumstances a prosecutor may not be obliged to notify a witness that he is a target, *United States* v. *Washington,* 431 U.S. 181 [1977]), certainly where the prosecutor seeks to induce or to argue waiver of the Speech or Debate privilege, he would be required to signal his intention.[32]

Recognizing the powerful institutional considerations which are at the heart of the Speech or Debate Clause, the Court of Appeals quite properly concluded:

> "Out of deference, then, to a co-equal branch of government, we hold that even if an individual member may waive his Speech or Debate privilege—a question we do not decide—any waiver in the context of a criminal prosecution must be express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member." [Pet. No. 78-349, 32a].

[32] The accused in *Washington,* when before the grand jury, was carefully informed of his self-incrimination privilege and clearly chose to waive it. 431 U.S. at 188. The Court found no constitutional requirement that the self-incrimination warnings be specially augmented for those witnesses who were potential defendants. Here, in contrast, there was no Speech or Debate Clause warning. How, then, could the Speech or Debate privilege be waived, when Mr. Helstoski never even appeared before the indicting grand jury, and was never informed that the Speech or Debate Clause was an issue during his appearances before eight other grand juries? Surely he should have been informed that his legislative conduct was the grand jury's prime concern.

The flaw in the government's waiver argument is revealed by the import of the position it maintained in the Court of Appeals. There, the government argued that waiver was effected not only by testimony before the grand jury but also by disclosures to constituents in correspondence and oral statements that the Congressman had performed legislative acts. If the test is indeed mere voluntariness of disclosure, such an extension of the argument is inevitable. If the grand jury testimony is taken as constituting a waiver because the testimony was voluntarily given, there is no basis for denying that a waiver may follow from other voluntary statements, which, as noted at page 60, *supra,* abound due to the necessity to publicize legislative acts. A legislative body in our society is a public institution which has as one of its important functions informing the public about its activities. Legislators do not keep their legislative activities confidential: they speak about them as much as they can, and indeed they should. This point was emphasized by the District Court in rejecting the government's waiver argument. Pet. No. 78-349, 56a.

The waiver argument presented in this case is one of universal applicability. Were it to be accepted, no Member of Congress could find protection in the Speech or Debate Clause.

CONCLUSION

The majority opinion in *Brewster* took careful note (408 U.S. at 521, 527-28) of dissenting opinions filed by Mr. Justice Brennan and Mr. Justice White, in which each argued that the realities of the "representative status" of Members of Congress should have led the Court away from permitting any prosecution for bribery to commit a legislative act.[33] See 408 U.S. at 542, quoting *Conflict of Interest and Federal Service,* 14, Association of the Bar of the City of New York (1960). Cognizant of the dangers pointed out by the dissenters, the *Brewster* majority noted that it had struck a reasonable balance. As the majority put it:

> "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." [408 U.S. at 525].

The government in this case seeks to destroy the careful balance spelled out by the majority in *Brewster.* There can be no doubt that if the government's view of this case were adopted, "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts" would become the standard grist of both

[33] Insight into the difficulties in dealing with these subtleties in jury trials is provided in the thoughtful opinion of Judge Wilkey in *United States* v. *Brewster,* 506 F.2d 62 (D.C. Cir., 1974). In that case the conviction of Senator Brewster after remand by this Court was reversed on the grounds of improper instructions to the jury on this very point.

criminal and civil litigation in innumerable contexts.[34] The Court has never drawn a distinction between civil and criminal proceedings in determining the impact of the Speech or Debate Clause.[35] If the view were adopted that legislative acts and the motivation therefor may be the basis of complaint or indictment and the basis of trial, it is awesome to contemplate the rash of civil and criminal trials that could develop out of charges of conspiracy involving Senators and Representatives who received campaign contributions from special interest groups concerned with legislation which favors one group of the population at the cost of another. See, by way of example, the natural gas compromise in the Energy Bill.

Though the Department of Justice can perhaps be relied upon to control career-oriented U.S. Attorneys,[36] we

[34] The *majority* of cases in which the Speech or Debate Clause has been invoked in this Court have been civil. See, *Kilbourn, Dombrowski* v. *Eastland, Powell* v. *McCormack, Doe* v. *McMillan, Eastland* v. *Servicemen's Fund,* and also *Tenney* v. *Brandhove,* involving a state Speech or Debate Clause. The only criminal cases have been *Johnson, Brewster,* and, at the grand jury stage, *Gravel.*

[35] Indeed, if a distinction were to be drawn, civil trials would be freer of Speech or Debate restrictions than criminal prosecutions. Mr. Justice Harlan, in his opinion for the Court in *Johnson,* made clear that the Speech or Debate Clause "was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney,* but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." 383 U.S. at 181.

[36] A former Attorney General of the United States ordered a U.S. Attorney not to sign an indictment—but that indictment was against a Congressman who enjoyed political favor in the White House. See, Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1239 (1973).

(Footnote continued on following page)

know of no control over imaginative civil litigation lawyers, public interest or otherwise, who would be tempted to fish the troubled waters of the legislative process, charging injury to their clients from legislation which they would assert was traded for campaign contributions. The obvious defendants in such suits would be both the special interest group and the legislators, who would be charged as co-conspirators. It is quite literally impossible to predict the myriad cases that may evolve from a breakdown of the kind of protection that has been afforded by *Johnson* and *Brewster,* namely, the simple but firm rule that the legislative process is not to be tried in the courts.

In short, allowing grand juries to return indictments that charge legislative acts and allowing proof of such legislative acts at trial, would open the floodgates to judicial involvement, civil and criminal, in the legislative process. These gates are now effectively barred by the restrictions developed by this Court in *Johnson* and *Brewster* as the narrowest possible construction of the Speech or Debate Clause consonant with both the separation of powers and the integrity of the legislature. However limited are the protections of those cases, they have been effective up until now to maintain the balance which the Court struck. That equilibrium is now threatened.

(Footnote continued from preceding page)

Unfortunately for Mr. Helstoski, he was a Democrat at a time when the U.S. attorney and the occupant of the White House were Republicans. Prior to this indictment, Mr. Helstoski had not only been an extremely active Congressman, he had also been prominent in political life in New Jersey, overcoming four gerrymanderings of his District by a Republican-controlled legislature. At one time he had been considered a serious contender for the governorship. On the federal level he was one of the five Members of Congress who on October 23, 1973, joined in the first impeachment resolution directed at President Nixon (H. Res, 649, 93d Cong., 1st Sess.).

The independence of the legislature and its ability to retflect without distortion the many competing and comprising interests which its Members were chosen to represent was given a higher priority by the Founders than the detection, detention, and punishment by the *courts* of one of those representatives. The Framers felt it wiser on balance to give to the Congress itself the authority, denied the executive and the judiciary, to scrutinize and, if need be, to punish the acts of its Members. This institutional view of legislative immunity serves to protect the judiciary as well as the legislative branch, for any more restricted or narrow understanding of the Clause would inevitably draw the bench closer to the quicksand of politicization of its own processes. To limit the Clause is to allow the executive to utilize the judiciary as a subordinate tool; to limit the Clause is to endanger the independence, not of one branch, but of two.

For the foregoing reasons, in No. 78-546 the judgment of the court below should be vacated and the cause remanded with instructions to dismiss Counts I through IV of the indictment. Failing that, in No. 78-349 the judgment of the court of appeals should be affirmed.

Dated: Newark, New Jersey
January 24, 1979.

Respectfully submitted,

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